No. 2912

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE FIRST NATIONAL BANK OF SAN FRANCISCO et al.,
Appellants,

vs.

DETROIT TRUST COMPANY et al.,
Appellees.

660-671 Colman Building,
Seattle, Washington

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

BRIEF OF APPELLANTS.

JOHN C. HOGAN,
HUGHES, McMICKEN, DOVELL & RAMSEY,
Solicitors for Appellants.

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LOWMAN & HANFORD CO., SEATTLE

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STATEMENT OF CASE.

On the 3rd day of August, 1916, the appellees, Detroit Trust Company and Alexander McPherson, as Trustees, commenced this action against the S. E. Slade Lumber Company and others, for the foreclosure of a mortgage or trust deed executed by the Lumber Company upon its mills and certain of its

timberlands, to secure a bond issue, of which $550,000 remained unpaid at the commencement of the action. In addition to the usual relief sought, the plaintiffs in said action prayed the appointment of a receiver of the mortgaged premises. (Record, pp. 6-90.)

A second mortgage for $69,000 was also given by the said Lumber Company to the Detroit Trust Company, on which, at the same time, a separate action for foreclosure was brought in the same Court, and that action has since, by order of the Court, been consolidated herewith.

The First Federal Trust Company and Milton R. Clark, Trustees under a third mortgage, were likewise made defendants in this action. The said third mortgage was given by the S. E. Slade Lumber Company to said last named Trustees on the 2nd day of June, 1915, to secure certain indebtedness then owing and certain advances then made by several of its creditors, including these appellants. (Record, pp. 168-198.) This mortgage covered the same premises described in the mortgage to the Detroit Trust Company and Alexander McPherson upon which this action is based, and was expressly made subject thereto and to the said second mortgage; and also included certain other lands in Chehalis (now Grays Harbor) County, Washington.

On August 4, 1916, the Detroit Trust Company and Alexander McPherson, plaintiffs and appellees herein, filed their separate petition for the appointment of a receiver, in which, among other things,

it was alleged "that the timberlands included in said mortgage are not now being operated or logged in any manner, that the sawmill of the mortgagor defendant is not being operated and has not been operated for two years, * * that the principal security for the payment of the bonds secured by the mortgage or deed of trust described herein is the timber on the lands covered thereby. That said lands when denuded of the timber thereon are of little value." (Record, pp. 91, 92.) The petition also prayed that the appellee, George L. McPherson, "be appointed receiver of the property covered by said mortgage, with full power to hold the same in his possession, custody and control until the further order of this Court, and with further power to take possession, care for and conserve the properties described in the bill of complaint and in the mortgage aforesaid, and with further power to manage and operate the properties covered by said mortgage, either by logging contract or otherwise, etc." (Record, p. 97.)

The Court thereupon appointed the said appellee as receiver of the mortgaged premises (Record, p. 101); and the said receiver, immediately upon qualifying as such and on the said 4th day of August, 1916, filed in said cause and presented to the Court his petition for an order authorizing him to enter into a contract with the Humptulips Logging Company for the logging of the timber upon said mortgaged premises, presenting with the said petition a copy of the proposed contract. (Record, p. 104.)

An order was thereupon entered by the Court, *ex parte,* on the same day, authorizing the said receiver to enter into the said proposed contract. (Record, p. 117.)

By the terms of said third mortgage, the Trustees therein were under no obligation or duty to perform any act thereunder "unless requested in writing so to do by the duly appointed representatives of said First National Bank of San Francisco, American National Bank of San Francisco and Welch and Company", a portion of the creditors secured thereby. (Record, p. 196.) The representatives of the two last named companies requested and demanded of said Trustees that they take no action in the premises. The representative of the said First National Bank in writing requested said Trustees to appear herein and resist the action aforesaid, and the appellant First National Bank of San Francisco tendered indemnity therefor; but the said Trustees declined to appear in said cause or to take any action in the premises.

On the 14th day of August, 1916, these appellants filed their petition in this cause, praying that so much of the order appointing said receiver as authorized him to operate said properties be vacated and that the said order authorizing said receiver to enter into the said proposed contract with the Humptulips Logging Company be likewise vacated and that the contract made in pursuance thereof be cancelled and set aside. (Record, p. 118.) Upon a hearing thereof, the trial judge filed a memoran-

dum opinion holding that the said petition to vacate the said orders would be denied, but that the orders would be modified so as not to permit the receiver to operate the property, except as to the logging contract made with the Humptulips Logging Company, without the further order of the Court (Record, p. 124). Thereafter, before the entry of any order thereon, the Court, upon the application of these appellants, made an order granting them leave, as intervenors herein, to amend their original petition and granting a rehearing thereof (Record, p. 126); and an amended petition was thereupon filed by these appellants. (Record, p. 128.)

The said petition again came on for hearing on the 18th of December, 1916, and the Court thereupon, on the same day, entered an order denying appellants' petition and allowing them an exception thereto. (Record, p. 139.) From said order this appeal has been perfected, and the appellants duly made and filed in said cause the following

ASSIGNMENTS OF ERROR.

That the decretal order entered in the above entitled cause on this 18th day of December, 1916, wherein the Court approved and made final the ex parte order heretofore entered in said cause on the 4th day of August, 1916, appointing George L. McPherson as receiver of the mortgaged premises described in plaintiffs' complaint, and further approved and made final the ex parte order of said Court made on the 4th day of August, 1916, author-

izing and directing said George L. McPherson, as such receiver, to enter into a contract with the Humptulips Logging Company for the logging of the timber upon said mortgaged premises, a copy of which contract is set forth in the petition of the receiver upon which said order is based, and denied the petition of these intervening defendants to vacate and set aside the contract made by said receiver in pursuance thereof, is erroneous and unjust to these intervening defendants:

First: Because the said George L. McPherson is not a receiver of an insolvent corporation and of all its assets and property, but is a receiver only of the mortgaged premises to care for and conserve the same and the rents and profits thereof, pending the foreclosure of the plaintiffs' mortgage, and is without power or authority to carry on or conduct the business of the mortgagor or any part thereof.

Second: Because the Court is without authority or power to authorize its said receiver to enter into a contract by which the carrying on of any part of the business of the mortgagor is delegated to a third party.

Third: Because the Court is without power to authorize the said receiver of the mortgaged premises to cut and remove the standing timber from the mortgaged premises or to cause the same to be sold and disposed of at private sale.

Fourth: Because the Court exceeded and abused its discretionary powers in authorizing and approving the making of said contract by its receiver.

Fifth: Because the execution and carrying out of said contract would require a period of eight or ten years and would prevent the final hearing and determination of the cause of action instituted by plaintiffs and pending herein and the entry and execution of a final decree therein during said time.

Sixth: Because the carrying out of said receiver's contract divests this proceeding of the ordinary judicial processes of the Court and authorizes the disposition by the receiver, at private sale, of the principal part of the property in the custody of the Court.

Seventh: Because it deprives these intervening defendants of their equity of redemption in said mortgaged premises which is secured to them by the execution and delivery of the mortgage of said S. E. Slade Lumber Company to the First Federal Trust Company and Milton R. Clark, mentioned in the complaint of plaintiffs in the above entitled cause.

Eighth: Because it impairs and diminishes the value of their equity of redemption in said mortgaged premises which is secured to them by the execution and delivery of the mortgage of said S. E. Slade Lumber Company to the First Federal Trust Company and Milton R. Clark, mentioned in the complaint of plaintiffs in the above entitled cause.

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The said contract which the Court authorized the receiver to enter into with the Humptulips Logging

Company (Record, p. 105) provided, in substance, as follows:

That the Logging Company was to have the exclusive right to enter upon said lands for the purpose of cutting and removing the timber thereon and was to log and place in the Humptulips River at least fifty million feet B. M. per annum. After placing them in the river, the Logging Company was to drive the logs with all possible dispatch and to market and sell them at the highest market prices obtainable by said Logging Company. The proceeds of the sale of the logs was to be disposed of as follows: First, the cost of driving, booming and towing the logs to market, not exceeding $1.30 per thousand feet, was to be paid to the Logging Company; second, $3.00 per thousand feet was to be paid to the receiver; third, the actual logging expense was to be paid to the Logging Company; fourth, the balance up to $1.00 per thousand feet was to be paid to the Logging Company as its profit; fifth, any balance remaining thereafter to be paid to the receiver. The receiver reserved the right to sell the logs upon paying the Logging Company the cost of logging and its profit of $1.00 per thousand feet thereon, and the contract provided: "But in no instance shall this be done unless I (the receiver) have in hand from the purchaser of any such logs a sum of money sufficient to pay me at least my $3.00 (per thousand feet) and you (the Logging Company) your logging expense and profit thereon."

The contract also provided that "This agreement

shall continue in full force and effect until the above described lands have been completely logged and lumbered, but it may be cancelled by either party hereto at any time, for any reason satisfactory to the party cancelling, upon sixty days (by this is meant days in which work can be done) written notice of such cancellation to the other party." The lands described in the contract consist of all the timberlands covered by the mortgage which is sought to be foreclosed in this action.

The mortgage in suit recites that the Lumber Company "owns large tracts of timber lands in the State of Washington, with a stumpage aggregating approximately six hundred and fifty-two million (652,000,000) feet, and also owns mills and mill sites and mill plants, water front, real estate, railroad tracks and right of way and equipment, logging equipment, and other structures and buildings on said property," (Record, pp. 31, 32) which property was thereinafter specifically described and mortgaged therein. Article III of said mortgage (Record, p. 53) provides:

"While the Lumber Company shall be in possession of the premises and property covered by this instrument, it is understood and agreed that the Lumber Company shall have the right to cut or remove timber from said premises or of the timber covered hereby, and convert the same to its own use, upon the following terms and conditions: Before beginning to cut or remove any such timber the Lumber Company shall file with the Trustee due and sufficient information, with maps, plats, facts and figures showing and advising the Trustee of the location and quantity of the timber which it is pro-

posed to cut or remove during each month of the period during which such cutting or removal is proposed to continue; all duly verified by the signature of the President or Secretary of the Lumber Company; the quantity of such timber shall be determined by the estimates of James D. Lacey & Company, duplicate copies of which are on file in the offices of the Trustee and the Lumber Company, or by other estimates satisfactory to and to be filed with and accepted in writing by the Trustee; the Lumber Company shall pay to the Trustee in advance on the first day of each month at the rate of three dollars ($3) per thousand feet of stumpage for all the timber proposed to be cut or removed during that month; the amount of timber so cut or removed shall be verified at the end of each month, or as often as the Trustee may in writing require; such verification shall be evidenced by the sworn statement of an officer of the Lumber Company, or of some other person satisfactory to the Trustee; in case such verification shall show any excess of timber over the estimates as aforesaid, the Lumber Company hereby covenants and agrees that it will immediately and without demand pay to the Trustee for such excess at the rate aforesaid; in case the amount of timber proves to be less than the estimate, the Lumber Company shall not be entitled to receive back any part of the price paid by it; all payments made under the provisions of this article shall be placed in the sinking fund hereinafter mentioned, and shall be disposed of as hereinafter provided.

Provided, that no timber shall be cut or removed as aforesaid without the consent in writing of the Trustee while the Lumber Company is in default in payment for timber, or in payment of principal or interest or in any other covenant, provision, agreement or condition hereunder. And provided further, that all cutting hereunder shall include all the merchantable timber included in the territory proposed to be cut over, and shall be done in a good, workmanlike manner and so as to reduce as much as possible the danger of fire."

The third mortgage, under which the indebtedness of the appellants is secured, contains the following provision (Record, p. 193) upon the above subject:

"Nothing in this instrument contained shall be construed as in any way limiting the right of the Mortgagor to cut or remove timber from the premises and property covered hereby and converting the same to its own use, free and clear of the lien of this instrument, so long as such cutting or removing is done in accordance with the provisions of the first mortgage above referred to, and so long as the Mortgagor is not in default in the performance of any of the covenants, stipulations, conditions and agreements on its part to be performed in said first mortgage, or in this mortgage contained."

Paragraph 3 of the agreed statement of the evidence (Record, p. 152) is as follows:

"The Lacey cruise, referred to in the mortgage sought to be foreclosed herein, a copy of which mortgage is attached to the bill of complaint of the Detroit Trust Company and Alexander McPherson in this cause, shows the amount of merchantable timber upon said mortgaged premises at the date thereof to have been 652 million feet, and it is shown by the evidence that subsequent thereto and prior to the first day of August, 1914, there had been logged and sold 100 million feet of timber, and that no logging had been done thereafter prior to the appointment of the receiver herein."

It is thus made to appear that the operation under the receiver's contract, if conducted at the minimum rate, would cover a period of upwards of ten years; that the lands when logged will be of only nominal value; and that the mill plant of the mort-

gagor had not been operated for about two years prior to the commencement of this action.

BRIEF AND ARGUMENT.

As will be seen from the foregoing statement, the receiver appointed in this case is a receiver only of the mortgaged premises in aid of foreclosure. The receiver is not invested with power and authority over the other property of the mortgagor, a portion of which at least is covered by the third mortgage securing these appellants. In other words, he is not a receiver of all the assets of an insolvent corporation for the benefit of all its creditors.

The question presented by the assignment of errors is whether a chancellor, in the appropriate exercise of the inherent power of a court of equity, may in such a case, where the mortgaged premises are adequate to the satisfaction of the debt secured by them, authorize its receiver to enter into a contract with a third party to conduct logging operations with a view to cutting all the timber on the land covered by the mortgage and selling the same at private sale through the agency of the company engaged in conducting the logging operations, for the purpose of paying the expenses of the receivership and of operation and of satisfying the debt secured by the mortgage; and especially where such operation is not designed to be merely temporary in character and for the preservation of the property, pending the foreclosure of the mortgage.

I.

By Section 804, Remington & Ballinger's Annotated Codes and Statutes of Washington, it is provided:

"A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law."

By this statute it is the declared public policy of this State that title and the right of possession of real property, with the fruits thereof, shall remain in the mortgagor until foreclosure and sale.

Norfor v. Busby, 19 Wash. 450.

In its opinion in that case the Supreme Court of Washington expressly approved the decision of this Court in the case of *Couper v. Shirley et al.,* 75 Fed. 168, in which case this Court affirmed the action of the trial court in refusing to appoint a receiver of mortgaged premises pending foreclosure, notwithstanding a stipulation in the mortgage that such appointment might be made, for the reason that such action would be in contravention of the statute of the State of Oregon, which is identical in terms with the statute of Washington above quoted.

In *Jones on Mortgages,* Sec. 1532, it is said:

"To warrant an appointment of a receiver it must be shown both that the property itself is an inadequate security and that the debt or the deficiency after the application of the proceeds of the security could not be collected of the mortgagor or other person liable for it. The property may be inadequate security for all the incumbrances upon it, and yet

be sufficient for the particular mortgage which is the subject of the foreclosure suit."

And see:

High on Receivers, §§642, 667.
Warner v. Gouverneur, 1 Barb. 36.
Brown v. Chase, Walker (Mich.), 43.

Without reference to the statute, therefore, there existed in this case no established equitable ground for the appointment of a receiver, unless it were for the mere care and custody of the property pending foreclosure and for the purpose of providing for the payment of taxes and the maintenance of proper insurance upon the mill properties; but even the latter would not alone justify the appointment of a receiver where, as in the case at bar, the mortgage authorized the mortgagee to pay the taxes and provide the insurance and include such advances within its mortgage lien.

Planters' Oil Mill v. Carter, (Ga.), 79 S. E. 1120, 1123.
Eureka Mining, etc., Co. v. Lewiston Navigation Co., 12 Idaho, 472.
Ray v. Carlisle, 125 Ga. 316.
Ferguson v. Dickinson, (Tex.) 138 S. W. 221.

In the case at bar, however, the mortgagor appeared and consented to the appointment of the receiver; and hence, so far as the appointment carried with it only the possession of the property and authority to care for and preserve it pending the foreclosure proceeding, these appellants would perhaps at this time have no ground for assignment of reversible error.

It will be seen, therefore, that the receiver exercises the possessory rights that, but for the voluntary consent of the mortgagor, would abide in it. The mortgagor, however, under the provisions of the third mortgage above quoted, being in default, has no right, over the objection of the beneficiaries under said mortgage, to log and sell the timber on the mortgaged premises.

As said by the Supreme Court of California (*Title Ins., etc., Co. v. California Development Co.,* 127 Pac. 502, 504):

"The right of a mortgagee to have a receiver take charge of the mortgaged property during the pendency of the action is founded upon the proposition that such action is necessary in order to preserve or protect the interest of the mortgagee. His only interest is the lien of his mortgage, and its extent is measured by the amount of the debt for which the lien is security. The debt is the substantial thing. Unless the security for its ultimate payment is in some way endangered or impaired, he cannot be prejudiced."

It is pertinent to inquire, therefore, whether a court of chancery may authorize a receiver of mortgaged premises, appointed on a bill of foreclosure, to do what neither the mortgagor nor mortgagee might lawfully do; what, indeed, they could not jointly do, in derogation of the rights of the beneficiaries under the third mortgage, and without the consent of the mortgagee thereunder.

In *Alderson on Receivers,* p. 526, it is said:

"A receiver of an insolvent corporation has no greater rights than the corporation. He is bound by all its legal acts; he is subject to all the rights

and equities existing against it, and the liabilities and rights of third parties are not changed by his appointment. He simply takes its place and stands as its representative, being also the trustee for the stockholders and creditors whose rights he may assert if they have been affected by the fraudulent or illegal acts of the corporation."

In the case at bar, however, the trial court authorized its receiver to enter into a contract with a third party for the logging and sale of the timber standing upon the mortgaged premises, on terms much less onerous and restricted than those under which the mortgagor, while not in default, was, by the terms of all the mortgages, permitted to log the premises. For it will be observed that the mortgagor under the terms of these mortgages was, while not in default, permitted to cut and remove the timber from the mortgaged premises only upon filing with the trustees maps showing the location and quantity of the timber proposed to be cut or removed during any month and paying for the whole thereof in advance at the rate of $3.00 per thousand feet stumpage, in accordance with the Lacey cruise; and all risks and expenses were to be incurred by it, including the risk that the amount of timber actually cut should be less than the Lacey cruise. Whereas, under the receiver's contract, the Logging Company assumes no like obligations or risks and is at liberty to prosecute its operations wherever it may deem it profitable to do so on the mortgaged premises, and to terminate the contract, without penalty, whenever its prosecution shall cease to return a profit satisfactory to it.

As has been aptly said by Mr. Justice Chadwick, in *Crawford v. Gordon,* 88 Wash. 553, 560, speaking of the power of courts of equity in case of a receivership:

"Courts have great power, but they cannot make contracts."

And surely courts cannot, through receivers appointed in aid of foreclosure, make contracts respecting the mortgaged premises which the mortgagor and the mortgagee could not make, either separately or conjointly, without the consent of a junior encumbrancer.

II.

Even were it assumed that a receivership of mortgaged premises in aid of foreclosure may in a proper case extend beyond the mere custody and preservation of the mortgaged property pending final judgment and sale, is the receiver's contract here involved an appropriate exercise of the just powers of a court of chancery? A brief consideration of the law on this subject will be enlightening.

In the case of *Little Warrior Coal Co. et al. v. Hooper,* (Ala.) 17 So. 118, 119, the Court says:

"The proper purpose for the appointment of a receiver is to conserve the assets for the protection and benefit of creditors, and pay them as speedily as possible. * * * It is only in extraordinary cases, and where public and quasi public corporations are involved, that a chancery court is justified in undertaking to carry on indefinitely the business through a receiver. In the case of *Smith v. Smith,* (Ala.) Brickell, C. J., says: 'We take occasion to mention that it does not belong to the jurisdiction of courts

to undertake the management of private or corporate business. When property is in the possession of a court, it must be preserved; and when no public duty is owing, as in the case of railroads, this is the extent to which courts are authorized to go. Such management, therefore, should in all cases be temporary, and limited to the performance of the duty of preservation.' "

The same court, in the case of *Etowah Mining Co. v. Wills Val. Min. & Mfg. Co. et al.,* (Ala.) 17 So. 522, 523, says:

"We know of no principle of law which justifies a court of chancery to take possession of property admitted to be that of a private corporation, whether conveyed to a trustee or not, merely for the purpose of running its business indefinitely through a receiver, to realize an income for the benefit of its creditors until they are paid from this source."

While in the case of *Fosdick v. Schall,* 99 U. S. 235, and numerous other cases, the Supreme Court of the United States has held that receivers of an insolvent railway company, pending a suit to foreclose a mortgage executed by the railway company, may operate the properties pending foreclosure and make the expense of operation a first lien thereon, it is nevertheless said by that Court, in *Wood v. Trust Co.,* 128 U. S. 416, 421:

"The doctrine of *Fosdick v. Schall* has never yet been applied in any case except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern."

In *Kneeland v. Trust Co.,* 136 U. S. 89, the Su-

preme Court, in condemning the practice of appointing receivers and attempting to exercise absolute control over the property, uses this language:

"It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations?

In *Hanna v. Trust Co.,* 70 Fed. 2, Mr. Justice Caldwell, in a suit to foreclose a second mortgage, in which a receiver was appointed, held that certificates might be issued to pay taxes, but that the Court would not, against the objection of the first mortgagees, issue certificates to displace their liens for other purposes. It may be here contended that the receiver will operate successfully under his contract and will not, by reason thereof, be compelled to issue certificates to constitute prior liens upon the mortgaged property. But, in any event, the timber will be cut, removed and sold, and appellants' lien thereon will thus be effectually destroyed, and without any recourse, unless relief be afforded on this appeal.

In *International Trust Co. v. United Coal Co.,* 60 Pac. 621, 625, the Supreme Court of Colorado said:

"After a careful consideration of all the authorities cited, we are of opinion that, in administering the affairs of an ordinary insolvent private business corporation, for which a receiver has been appointed, a court of equity has not the power to authorize the receiver to incur indebtedness for carrying on the business, and to make the same a first and paramount lien upon the corpus of the property, superior to that of prior lienholders, without

their consent. While it may, in a proper action, and with the proper parties present, through the instrumentality of a receiver, carry on the business of private corporations or individuals temporarily, and incur obligations therefor that may be made a paramount lien on the corpus of the property, *such obligations must have been contracted for, and must relate strictly to the preservation of the status of the property at the time of the appointment of the receiver.* We are not disposed to extend the doctrine established by the federal courts in administering upon insolvent railroad corporations to those of ordinary business corporations." (Italics ours.)

In *Hanna v. State Trust Co.* (*supra*), Mr. Justice Caldwell says:

"It is not a function of a court of equity to carry on the business of private corporations, whether solvent or insolvent. * * * Its only guide is that varying and unknown quantity called 'judicial discretion.' * * * 'Rights,' says the Supreme Court of the United States, 'under our system of law and procedure, do not rest in the discretionary authority of any officer, judicial or otherwise.' * * * It is no part of the duty of a court of equity to conduct the business of insolvent private corporations, any more than it is to carry on the business of insolvent natural persons. If it may take under its control the property of an insolvent private corporation, and authorize a receiver to carry on its business, and make the debts incurred by the receiver in so doing paramount liens on all the property of the corporation, and enjoin its creditors in the meantime from collecting their debts, it is not perceived why it may not proceed in the same way with the estate of an insolvent natural person."

In the case of *Bigbee v. Summerour,* 28 S. E. 642, 643, the Supreme Court of Georgia uses this language:

"A receiver should be appointed only in cases of extreme necessity, and then only when his appointment is necessary to the preservation of the thing or right in controversy. * * We do not mean to intimate that cases may not arise in which, in the exercise of a wise discretion, a circuit judge would be authorized to appoint a receiver, and direct him to continue the conduct of a business in which the defendant was engaged at the time his property was seized; but we do mean to say that such a course can only be justified when it is absolutely necessary to the preservation of the rights of the parties, it being borne in mind that preservation of the property is the purpose for which a receiver is primarily appointed, and that a judicial administration through him of an estate seized by the court, though the final is nevertheless a secondary consideration. Necessarily, these matters are largely within the discretion of the trial judge, *but at last it becomes a question of law whether the court can lawfully embark property seized by it in an industrial enterprise, and the exercise of this power depends upon how far such conduct may be fairly necessary to the preservation of the existing status.*" (Italics ours.)

In *Gutterson & Gould v. Lebanon Iron & Steel Co.,* 151 Fed. 72, 74, it is said:

"A managing receivership is never undertaken except with the view to winding up the affairs of the company and a sale of its property."

In the light of the principles laid down in the foregoing authorities, how can it be said that the trial court acted within the just scope of his powers in authorizing the receiver to enter into the contract in question with the Humptulips Logging Company? If this contract is permitted to be carried out, the following consequences will result:

(1) The receiver will be permitted to delegate to

a third party the possession and control of the most valuable property in his custody and to operate the business of cutting, removing and selling the logs thereon and of collecting and receiving the proceeds of said logs, without bond and without being immediately responsible to the Court for its acts or conduct.

(2) A receiver's contract will be sanctioned and approved which could not have been made, over the objection of appellants, by either the mortgagor or mortgagee, or by their joint action; and not only so, but that contract will be in conflict with the mortgage contract upon which this action is based, as well as the third mortgage securing these appellants.

(3) The Court's receiver will be permitted to alter the character of the mortgaged premises in his possession and convert the principal value of the mortgaged real estate into personal property, and this, not by himself, but through the agency of a third party.

(4) The principal element of value in the mortgaged property, after being converted from real estate into personalty, will be sold at private sale; and this, not by the receiver directly, but through an irresponsible agency.

(5) The carrying out of the receiver's contract will prolong this litigation and prevent the entry and execution of a final decree herein for a period of more than ten years, and thus arrest the due and ordinary course of the administration of justice.

(6) The carrying out of said receiver's contract

will, as to the principal part of the mortgaged premises, prevent the exercise of the ordinary judicial processes of the court in foreclosure cases.

(7) It will deprive these appellants of their equity of redemption so far as concerns the principal part of the mortgaged premises, and will impair its value as to the remainder.

(8) If the receiver's contract is carried out to successful completion, it will result in the gradual, but ultimate, satisfaction of the debt secured by the mortgage sought to be foreclosed herein and the consequent dismissal of this action, without any redress from the wrong suffered by these appellants, unless the same be redressed upon this appeal.

Respectfully submitted,

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Solicitors for Appellants.